Supreme Court, U.S.
FILED
AUG 20 2003
OFFICE OF THE CLERK

No. 02-749

IN THE

Supreme Court of the United States

RAYTHEON COMPANY,

Petitioner,

v.

JOEL HERNANDEZ,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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CORPORATE DISCLOSURE STATEMENT

Petitioner's Rule 29.6 Statement was set forth at page ii of Petitioner's Opening Brief, and there are no amendments to that Statement.

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Neither Hernandez nor his *amici* has made any substantial effort to defend the Ninth Circuit's opinion in this case. Instead, they advance new arguments as alternative theories that, they say, can justify affirmance. But the flight from the Ninth Circuit's rationale is not a reason to dismiss the writ (as Hernandez's *amici* suggest), but rather a reason to reverse the judgment. The proffered alternative arguments lack merit. We discuss the three possible ADA theories — disparate treatment, denial of reasonable accommodation, and adverse impact — in turn.

I. There Was No Disparate Treatment; Hernandez Was Treated The Same As All Other Employees Involuntarily Terminated For Misconduct

A. Because Hernandez Was Treated Exactly The Same As All Others Ineligible For Rehire, There Was No Disparate Treatment Based On Disability

Petitioner's opening brief demonstrated that Hughes treated all of its employees — the disabled and the nondisabled — in precisely the same fashion. Every employee who engaged in workplace misconduct serious enough to warrant involuntary termination faced two invariable consequences: (i) discharge; and (ii) ineligibility for rehire. Hughes thus did not engage in disparate treatment — "discriminate" — against Hernandez.

The National Employment Lawyers Association ("NELA"), notes that the ADA was intended to ensure "equal opportunities to individuals who have successfully recovered from addiction." (NELA Br. at 10.) We have no quarrel with that position. Hernandez (for purposes of the disparate treatment theory) was entitled to equal treatment, to be free from discrimination — nothing more. Equal treatment he received. Hughes applied to Hernandez the same no-rehire rule it applies to others involuntarily terminated for misconduct.

1. Hernandez contends that Hughes did not "really" have a no-rehire rule or that its application to him was pretextual. He contends that Hughes' position statement to the EEOC admitted that Hughes rejected him for rehire because of his record of addiction and supposed lack of rehabilitation. Therefore, he contends, a reasonable factfinder under *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 147 (2001), could conclude that the no-rehire rule was a "belated assertion" that surfaced "only *after* [Hughes] had been sued" and thus was a pretext for intentional discrimination. (Resp. Br. at 19, 28.)

Hernandez is wrong. Even the Ninth Circuit agreed that "[t]here is no question that Hughes applied this [no-rehire] policy in rejecting Hernandez's application." (Pet. App. 12a n.17.) On this point the Ninth Circuit plainly was correct, and nothing in Hughes' EEOC response is to the contrary. The letter recited the relevant facts from 1991: Hernandez failed a drug test administered because he "arrived at work demonstrating signs of aberrant behavior including bloodshot eyes, unsteady gait and slurred speech." J.A. 18a.[1] The letter then explained why Hernandez had no viable ADA claim. (J.A. 19a-20a.) The letter first pointed out that there was no reason to believe Hernandez was even covered by the ADA at the time of his reapplication,

1. Hernandez now asserts that he had only "trace amounts of cocaine in his urine" (Resp. Br. at 12), and his *amicus* implies that he and other drug users are ensnared by positive test results even if the user has taken pains not to commingle drug use and work time. (*See* NELA Br. at 12.) In fact, Hernandez had twice the amount of cocaine in his system necessary for a positive test result. (Exhibit F to Hughes' Motion for Summary Judgment.) Moreover, Hernandez admitted that he reported for work that day after staying up most of the prior night drinking alcohol and snorting cocaine. (J.A. 34a, 36a.) He presented himself for work on military missile systems while apparently under the influence; he was subjected to testing based on this reasonable suspicion; and the test confirmed what visual observation had suggested: very recent use. Quite properly, Hernandez never challenged the propriety of Hughes' decision to terminate him.

since his application did not disclose a prior drug addiction (let alone claim rehabilitation), and the ADA does not cover current drug users. 42 U.S.C. § 12114(a).

Moreover, Hughes' defense did not rise or fall on that issue. The very next paragraph of Hughes' EEOC response refuted Hernandez's current contention that Hughes did not "really" have a policy making involuntarily terminated employees ineligible for rehire. The letter stated, in relevant part:

> The Company maintains it[s] right to deny re-employment to employees terminated for violation of Company rules and regulations. . . . Complainant's conduct while employed by [Hughes] makes him *ineligible for rehire*.

(J.A. 20a; emphasis added.)

The issue on summary judgment was whether a reasonable factfinder could conclude that Hughes fabricated the existence of the no-rehire policy. *Reeves*, 530 U.S. at 146-47. The answer clearly is "no," because: (i) Bockmiller testified that the policy existed (J.A. 57a); "[B]ased on the practice that we had, the individual would not be eligible for re-hire"); (ii) Medina so testified as well (J.A. 80a; Hernandez "violated company practice, policies, rules, whatever, and our practice has always been that they don't get reemployed"); (iii) Hernandez had two years of discovery to contradict this testimony, or to find evidence that exceptions had been made to the rule, but he failed to do so (and he also failed to ask for more time under Fed. R. Civ. P. 56(f) to conduct additional discovery on that issue);[2]

2. Hernandez's *amici* note that, after this litigation commenced, Hughes offered Hernandez the unconditional opportunity to take a pre-employment skills qualification test in 1999 (Hernandez took the test but failed). (Betty Ford Center Br. at 9.) But it is not remarkable that, after the inception of this litigation, Hughes searched for a cost-effective

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(iv) Hughes' EEOC letter specifically referenced the policy; and (v) Hughes' policy is commonplace throughout industry (*see* Brief for Equal Employment Advisory Council and U.S. Chamber of Commerce as *amici curiae*). No reasonable factfinder could disagree with what the Ninth Circuit itself stated (Pet. App. 12a n.17): "there is no question" that Hughes had a no-rehire rule and applied it in Hernandez's case.

2. Hernandez's *amici* argue that a no-rehire rule is inconsistent with what they posit as the "ideal" of rehabilitation. They are incorrect. Hughes then, and its successor Raytheon now (and virtually every large American employer), fully support (and in many cases financially underwrite the cost of) rehabilitation where individuals voluntarily come forward and seek treatment. For example, when Hernandez voluntarily sought treatment in 1986, Hughes accommodated him. Immediately following the 1986 treatment, Hernandez (unbeknownst to Hughes) again began abusing drugs. (J.A. 32a.) But this case is not about seeking voluntary treatment. In 1991, Hernandez never sought any treatment at all; he came to work just hours after a binge and tested positive for drug use. (J.A. 33a-34a.) The issue here is not what happens when an individual voluntarily seeks treatment, but what rights an employer has to discipline those who *do not* seek treatment and are caught violating work rules.

Hernandez was treated just like every other person committing a serious rules violation at Hughes. He was:

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method of resolving the dispute or minimizing its legal exposure out of an abundance of caution. This Court itself has endorsed the making of (and enforced the consequences of refusing) unconditional offers of reinstatement. *Ford Motor Co. v. EEOC*, 458 U.S. 219 (1982). The offer to Hernandez does not at all undermine the *bona fides* of the no-rehire rule as it existed five years earlier.

(i) discharged; and (ii) declared permanently ineligible for rehire. There was no disparate treatment based on drug use or addiction in applying to him the standard terms of Hughes' no-rehire rule.

B. Bockmiller, The Decisionmaker, Did Not Even Know About Hernandez's Protected Status, Let Alone Harbor Discriminatory Animus

Hernandez's efforts to show intentional disparate treatment were particularly ineffective because the rehire decisionmaker, Bockmiller, was completely unaware of the sort of misconduct that had led to Hernandez's discharge. Bockmiller testified without contradiction that she did no more than review the "Employee Separation Summary" on the top of Hernandez's personnel file (J.A. 12a). When she read the words "Discharge[d] for personal conduct (Quit in lieu of discharge. . . .)," her review ended. (J.A 22a.) It made no difference whether the misconduct was insubordination, gambling on premises, theft, sexual harassment, fighting, or drug use. All of this is uncontradicted in the record.

Hernandez claims, however, that a jury might conclude that Bockmiller was lying — that she not only knew Hernandez had been a drug abuser but also based her decision on that fact. He cites: (i) the letter from Hernandez's social worker attached to his application; (ii) the fact that Bockmiller (had she chosen to look) had access to documents that would have revealed his prior drug abuse; and (iii) the wording of Hughes' letter to the EEOC. (Resp. Br. at 22-29.)

But the social worker's letter refers only to Hernandez's alcohol abuse, not to his alleged addiction to drugs (J.A. 14a-15a), and Hernandez does not even claim that he was disqualified from rehire because he formerly used alcohol. That Bockmiller *could have* investigated further and learned about Hernandez's drug use does not support a reasonable inference that she *actually did so*, particularly where she testified to the contrary. A plaintiff

cannot avoid summary judgment "by merely asserting that the jury might . . . disbelieve the defendant's" testimony. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). That is especially true here because there was no reason for Bockmiller to investigate further after reading the dispositive language in the Employee Separation Summary that rendered Hernandez ineligible for rehire.

As for Hughes' EEOC response letter, it specifically referred to the policy that made Hernandez ineligible for rehire. Bockmiller testified without contradiction that she relied upon that policy in rejecting Hernandez's application. No reasonable factfinder could conclude anything other than that: (i) Bockmiller made the decision based on the no-rehire policy, and she treated Hernandez's application the same as any other application for rehire where the applicant earlier had been involuntarily terminated because of misconduct; and (ii) Bockmiller had no knowledge of Hernandez's prior drug use, let alone a discriminatory animus toward recovering addicts.

Hernandez and his *amici* claim, however, that Hughes' evidence was incompetent to support summary judgment because that evidence came from its employees. Such persons, the Court is told, should be disbelieved; they allegedly are "interested" in the litigation because of their employment at Hughes. (Resp. Br. at 25-26; Betty Ford Center Br. at 7.) Hernandez and his *amici* cite this sentence in *Reeves*:

> [In considering a motion for summary judgment,] the court should give credence to the evidence favoring the nonmovant as well as that evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses.

530 U.S. at 151.

This language in *Reeves* does not justify dismissing Hughes' evidence. To so read it does violence to the Court's cases before *Reeves* and since. As far back as *Chesapeake & Ohio Ry. Co. v. Martin*, 283 U.S. 209 (1931), for example, the Court held that the trial court "is *not* at liberty to disregard the testimony of a witness [solely] on the ground that he is an employee of the defendant, in the absence of conflicting proof. . . . The fact . . . that the witness was an employee of the [moving party] . . . [is] not enough." *Id.* at 214, 216 (emphasis added). More recently, in *Clark County School District v. Breeden*, 532 U.S. 268, 273-74 (2001), this Court unanimously reinstated a summary judgment against an employee based largely on an affidavit of the defendant employer's manager.

Labeling all employees as "interested" — and thus suspect — witnesses would effectively preclude the use of summary judgment in employment cases. The Court in *Reeves* did not mean that a court considering a summary judgment motion must, should, or even can ignore the testimony of the one person normally uniquely situated to testify about the reason for an individual's discharge (or other adverse employment decision): the supervisor or other decisionmaker. If company employees' testimony cannot support a motion for summary judgment, as Hernandez contends, employment cases would be effectively exempt from the normally applicable summary judgment rules because employers *inevitably* are forced to rely on their managers for factual evidence supporting their employment decisions.[3]

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3. *E.g.*, *Sandstad v. CB Richard Ellis, Inc.*, 309 F.3d 893, 898 (5th Cir. 2002) ("The definition of an interested witness cannot be so broad as to require us to disregard testimony from a company's agents regarding the company's reasons for discharging an employee."), (Cont'd)

This is not the law, as the *Reeves* Court itself made clear; lower courts should reject any construction of the rules of procedure that would "insulate [the] entire category of employment discrimination cases from [summary judgment] review . . . ." 530 U.S. at 148 (citation omitted).

No factfinder would have been entitled to reject the uncontradicted testimony of summary judgment declarants Medina and Bockmiller — testimony, by two persons who did not even know Hernandez, that Hernandez could not rebut after two years of discovery.

In sum, it is undisputed that Hughes had a no-rehire policy and that it refused to reemploy Hernandez because of that policy. There was no disparate treatment.

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cert. denied, 123 S. Ct. 2572 (2003). In *Traylor v. Brown*, 295 F.3d 783, 791 (7th Cir. 2002), the court observed:

> We do not interpret the quoted language [from *Reeves*] so broadly as to require a court to ignore the uncontroverted testimony of company employees or to conclude, where a proffered reason is established through such testimony, that it is necessarily pretextual. To so hold would essentially prevent any employer from prevailing at the summary judgment stage because an employer will almost always have to rely on the testimony of one of its agents to explain why the agent took the disputed action.

II. There Was No Unlawful Failure To Grant Hernandez Preferential Treatment; Only Persons Actually Disabled Are Entitled To Reasonable Accommodation, And A "Second Chance" Is Not A Required Accommodation In Any Event

A. "Regarded As" And "Record Of" Plaintiffs Are Entitled Only To Nondiscrimination — Not To Preferential Treatment

Hernandez all but ignores the arguments made in the opening brief on the issue of reasonable accommodation. But his *amici* claim that Hernandez was entitled to reasonable accommodation, notwithstanding the language of the statute, which only requires employers to "mak[e] reasonable accommodations *to the known physical or mental limitations of an otherwise qualified individual with a disability*. . . ." 42 U.S.C. § 12112(b)(5)(A)-(B) (emphasis added). Hernandez concedes that, when he reapplied, he had no such "limitations"; his ADA rights (if any) arose solely under the ADA's "regarded as" and "record of" prongs, as the Ninth Circuit correctly stated. (Pet. App. 6a n.8.) Because Hernandez had no actual "limitation" when he reapplied, there was nothing for Hughes to accommodate.

Hernandez's *amicus* NELA argues, however, that "regarded as" and "record of" plaintiffs may be entitled to an accommodation. NELA asserts that people "who are protected [by statute] due to their rehabilitated drug addiction have a present impairment." (NELA Br. at 27 & n.29.) That assertion does not withstand scrutiny; a drug addict is fundamentally different from a *rehabilitated* drug addict. The former is not protected by the ADA at all, even if that drug use might have caused a physical or mental impairment that substantially limits a major life activity. That is so because of the ADA's categorical

disqualification of current drug users. 42 U.S.C. § 12114(a). Once the addict has been rehabilitated, the existence of an ADA-qualifying physical or mental impairment normally would disappear as well, which means there would remain no impairment requiring accommodation.

In any event, regardless of whether some hypothetical rehabilitated drug addict might remain impaired, Hernandez did not. He testified that at the time *he* reapplied he was not limited in any respect, and that he had been drug-free for well over a year. (*See, e.g.*, Hernandez Dep., 75:18-25.)[4] Thus, even if it were possible to conceive of some rehabilitated drug addict who continued to have a substantially limiting physical or mental impairment, Hernandez was not such a person. As the Ninth Circuit correctly noted:

> Hernandez does not claim that he was actually disabled at the time he applied to be rehired by Hughes in 1994. Rather, he argues that he was not rehired because of his record of disability, and/or because he was regarded as being disabled. The parties agree that Hernandez's claim of discrimination is limited to either a "regarded as" or a "record of" definition of disability.

(Pet. App. 6a & n.8.)

Because Hernandez was only a "regarded as" or "record of" plaintiff, no reasonable accommodation obligation was owed.

4. Hernandez never claimed (let alone proved) that he *ever* suffered from any incapacity in performing major life activities, even when he was using drugs. *Cf. Toyota Motor Mfg., Inc. v. Williams*, 534 U.S. 184, 196-99 (2002) (requiring such proof as part of the prima facie case). For all the record revealed, Hernandez was a recreational drug user who one day simply decided to stop without any form of treatment. (J.A. 44a.)

B. A "Second Chance" Is Not A Reasonable Accommodation

Hernandez did not offer a meaningful response to the long line of court of appeals authority that holds that a "second chance" is not a reasonable accommodation.[5] His only response is to assert in conclusory fashion that he is "*not* asking for a second chance." (Resp. Br. 33-34.) This assertion is belied by Hernandez's statement elsewhere in his own brief "that Mr. Hernandez . . . merited 'a second chance.'" (*Id.* at 23.)

Hernandez's *amici* do not deal with the "second chance" issue any more persuasively. The ADA makes clear that employers can hold drug users "to the same qualification standards for employment or job performance or behavior that such entity holds other employees." 42 U.S.C. § 12114(c)(4). A "second chance" requirement would eviscerate that right. An employee lawfully could be discharged for misconduct (like using drugs); the individual could reapply, claiming rehabilitation; the employer could truthfully state that it was declining to rehire pursuant to its standard policy of not rehiring persons discharged for misconduct; and the individual could say "Gotcha, I am entitled to a second chance because my misconduct could be related to a disability." Surely the ADA

5. Conspicuously absent from the briefs of Hernandez and his *amici* is a citation to even one decision, by any court at any level, holding that an employer can be compelled to rehire a lawfully terminated individual as a reasonable accommodation. The one case proffered by the Betty Ford Center (Br. at 24), *Herman v. City of Allentown*, 985 F. Supp. 569 (E.D. Pa. 1997), does not so hold, and in fact it supports the Company's position. *Herman* did not involve a no-rehire rule of the sort at issue here, but rather a no-rehire decision made on an ad hoc, and indeed discriminatory, basis. The court held that the defendant city "was *not* required to rehire Mr. Herman under the ADA in the first place. But, once the City agreed to rehire the Plaintiff, it could not discriminate against the Plaintiff in the re-hiring process." *Id.* at 576 (emphasis added).

does not contemplate this sort of revolving door. Hernandez's *amicus* NELA concedes, as it must, that employers can "prohibit the use of illegal drugs." (NELA Br. at 13, *citing* 42 U.S.C. § 12114(c)(1) & (2).) But the "prohibition" would be feckless if the individual could evade it simply by reapplying. Once an employee is lawfully discharged (as Hernandez was here), employers are entitled to insist that the separation be permanent.

Hernandez's *amici* assert that it is in everyone's interest for a drug addict to seek rehabilitation. (NELA Br. at 10; Betty Ford Center Br. at 15-16.) *Amici* then argue that drug addicts will not be motivated to seek rehabilitation if they will be unable to get jobs. *Amici* paint a distressing picture of a class of reformed drug addicts unable to find work because of exclusionary employer policies. (NELA Br. at 11; Betty Ford Center Br. at 2; *see also* Resp. Br. at 8-10.)

That distressing picture is an illusion. Hernandez's *amici* argue as if all employers were free to bar perpetually from employment anyone who had ever used drugs. But employers cannot — and Hughes did not — disqualify all rehabilitated drug addicts from employment. Only persons involuntarily terminated *by* Hughes for misconduct *at* Hughes are barred. Hernandez, for example, is entitled under the ADA to have his future job applications considered on their merits by every employer in the United States — except for Hughes, the company from which Hernandez earlier had disqualified himself by reason of misconduct. And every ADA-covered employer, including Hughes, must consider on a nondiscriminatory basis every applicant who is a rehabilitated drug user, except the applicant(s) that this same employer earlier lawfully discharged for misconduct. Thus, the specter of a class of "reformed drug

addicts unable to find work" grossly misrepresents the very limited effect of no-rehire rules.[6]

Hernandez's *amici* contend, however, that the ADA was designed to provide "incentives" for treatment and rehabilitation, and that second chances provide these incentives. (NELA Br. at 11.) In fact, requiring employers to grant second chances provides exactly the opposite incentive, because the second-chance requirement would assure drug users one free bite at the apple — and thus would provide a distinct *dis*incentive to early treatment and rehabilitation. An individual could continue to use drugs, comfortable in the knowledge that he or she might never be detected, and that even if detected, a statutory second (or third or fourth) chance would be made available simply by asserting that "a disability made me do it." If the "incentive" to seek treatment animated Congress in drafting the ADA, Hughes' no-rehire rule reinforces rather than undermines that incentive.

Labor law has long recognized how the "incentive" works; there is a fundamental difference between seeking treatment: (i) voluntarily and proactively, as opposed to (ii) involuntarily upon detection. As one labor arbitrator put it:

> It is true that [grievant] admitted his [drug] use and asked to be placed in a rehabilitation program. However, none of this was done until after he got "caught in the act" through the security investigation. Many employers would not allow someone caught in the act to then "volunteer" to enter an [employee

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6. The authorities cited by Hernandez's *amici* (NELA Br. at 24 & n.25; Betty Ford Center Br. at 9-16), including the EEOC's Technical Assistance Manual, thus are inapposite. They simply explain what a *new* prospective employer may and may not do when a recovering addict applies in the first instance.

> assistance] rehabilitation program — one is eligible only if they come forth and volunteer prior to being caught in the act.

Federal Aviation Administration, 93 Lab. Arb. (BNA) 41, 46 (1989) (Allen, Jr., Arb.); *accord Cajun Elec. Power Coop, Inc.*, 108 Lab. Arb. (BNA) 641, 648 (1997) (Howell, Arb.) (allowing an employee to escape discipline by seeking assistance with substance abuse after testing positive would "send to employees a message that all one need do to avoid discharge for reporting to work under the influence would be to seek rehabilitation").[7]

This longstanding principle provides the response to the contention of Hernández's *amici* that Hernandez simply was punished for his (supposed) addiction, *i.e.*, for "using drugs while an addict." (*E.g.*, NELA Br. at 12; Betty Ford Center Br. at 3, 4, 16, 17, 20, 27.) Hernandez's offense was *reporting to work* after snorting cocaine all night, not for using drugs in the first place.

The employer's modest contention here — which gives force to the ADA's text in 42 U.S.C. § 12114(c)(1) (employers "may prohibit the illegal use of drugs"), and § 12114(c)(4) (employers "may hold an employee who engages in the illegal

7. *See also Kosmos Cement Co.*, 114 Lab. Arb. (BNA) 1811, 1812 (2000) (Lalka, Arb.) (applying policy that provided amnesty for employees who voluntarily admitted drug problem before a "triggering" incident occurred but provided "no second chances" for employees who test positive for illegal drugs); *Stanley Door Sys.*, 89-1 Lab. Arb. Awards (CCH) ¶ 8141 (CCH 1988) (Doering, Arb.) ("[A]ssertion of a dependency at point of discharge is not a proper basis for mitigation. . . . *To accept such assertions as a basis for mitigation of discharge would . . . mak[e] it unnecessary for employees to face up to substance abuse any time before the axe actually fell.*") (emphasis added). Some state statutes are to similar effect. Cal. Lab. Code § 1025 (prohibiting discharge of persons "voluntarily" seeking rehabilitation, but permitting discharge of drug users in other circumstances).

> use of drugs . . . to the same qualification standards for employment . . . that [it] holds other employees") — is simply that an employer is entitled to decide that it will not rehire persons that it lawfully discharged. That measured response does not jeopardize more than a tiny fraction of employment opportunities for rehabilitated drug users. And to the extent that there is any jeopardy at all, it is a salutary one: it enhances the incentive for seeking early treatment and rehabilitation. Nothing in the ADA's reasonable-accommodation obligation is to the contrary.

III. No Adverse Impact Claim Is In This Case, And For Good Reason: There Would Be No Merit To It

No adverse impact claim is presented here; it was waived in the lower courts, as the Ninth Circuit stated. (Pet. App. 13a n.20.)[8] Thus, only the disparate treatment and reasonable accommodation issues are before this Court. Hernandez's (half-hearted) and NELA's (more strenuous) effort to inject a new theory into the case simply underscores the flawed reasoning in the Ninth Circuit's decision. Hernandez's *amici* suggest that the writ of *certiorari* should be dismissed. (NELA Br. at 2-5 & nn.4-5.) The *amici* seem to imply that, but for the inadvertence of Hernandez's counsel, there would have been a viable adverse-impact attack on Hughes' no-rehire rule. NELA's desire to preserve the Ninth Circuit's opinion is understandable, but its contentions for dismissal of the writ are unsound.

The adverse-impact theory is not in this case because there is no plausible basis to challenge a no-rehire rule under that theory. First, Hernandez was not disqualified from rehire "because of [a] disability." The ADA provides:

8. Hernandez's *amicus* NELA agrees that no adverse impact claim is presented here. (NELA Br. at 2 & n.4.)

> No covered entity shall discriminate [defined in § 12112(b)(6) to include the use of "qualification standards, employment tests or other selection criteria that *screen out or tend to screen out* an individual with a disability or a class of individuals with disabilities"] against a qualified individual with a disability *because of the disability of such individual* in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112(a) (emphasis added).

Hernandez, however, was not "screened out" by Hughes "because of" his disability, *i.e.* his "record of" drug addiction. Hernandez was not rehired because he violated Hughes' rules of conduct. His violations of course happened to be factually related to drug use,[9] but his discharge and disqualification from rehire were not "because of" drug use or any disability. The no-rehire rule applied to a wide variety of misconduct discharges,

9. Drug *use* is not the same as drug *addiction*. As the Solicitor General pointed out in his brief, there is no reason even to believe that the effects of a drug-use rule fall principally on addicts. (Br. for United States at 15-16.) "Recreational" users of drugs vastly outnumber addicts, and thus the impact of even a no-drugs-at-work rule actually falls more heavily on such "recreational" users, who are not ADA-protected while they are using drugs or after they stop. According to recent statistics compiled by the U.S. Substance Abuse and Mental Health Services Administration, over 15.9 million Americans are current users of illegal drugs. But barely a third of that number, 5.6 million, show symptoms of addiction. *See* Office of Applied Studies, 2001 National Household Survey on Drug Abuse (NHSDA), *at http://www.samhsa.gov/oas/nhsda/2k1nhsda/vol1/highlights.htm* (last visited Aug. 18, 2003). In any event, Hernandez never attempted to prove the relationship between drug use and addiction that he now hypothesizes.

not just to drug cases. Hernandez never attempted to demonstrate an adverse impact on the group of disabled Americans (or even on the sub-group of recovered addicts), and there is no reason to believe (absent reliance on the very stereotypes Hernandez and his *amici* presumably would decry), that such proof of adverse impact exists. Surely the disabled do not engage in the range of serious work-related misconduct that triggers the no-rehire rule — fighting, insubordination, drug use, gambling, theft, sexual harassment, and the like — significantly more often than the nondisabled. Without this sort of proof, no adverse impact claim would be possible.[10]

There is no adverse impact even on the sub-group of drug users and addicts. The following hypothetical illustrates why. Suppose that Hernandez's application for rehire arrived at Hughes the same day as those of three other applicants, *A*, *B*, and *C*, who have histories of drug use and rehabilitation identical to that of Hernandez. Neither *A* nor *B* had worked for Hughes previously. Candidate *A* had been terminated by some other company for drug-related misconduct. Candidate *B* had applied for a job at Hughes more than a year earlier, but he was rejected then because of a positive preemployment drug test. Candidate *C* worked for Hughes but rather than come to work under the

10. Hernandez's amicus NELA argues that, because § 12112(b) (quoted in part above), can proscribe rules that "tend to" screen out "an individual," adverse impact under the ADA is fundamentally different from other discrimination laws. Not so. Title VII, for example, also applies to rules that "tend to" impact "any individual," 42 U.S.C. § 2000e-2(a)(2), and yet under Title VII it is well established that an individual advancing an adverse impact claim must prove a disproportionate impact on a protected group to which the individual belongs. *See, e.g., Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 986-87 (1988) (disparate impact analysis requires proof that "facially neutral employment practices . . . have significant adverse effects on protected *groups*. . . .").

influence of drugs, he resigned and sought treatment. If Hughes' rule had an adverse impact "because of" prior drug addiction, the rule would exclude (or at least would "tend to" exclude) all four applicants in this hypothetical. But in fact Hughes' no-rehire rule treats Candidates *A*, *B*, and *C* differently from — and more favorably than — Hernandez. Hernandez of course is ineligible for rehire under the rule. But Candidates *A*, *B*, and *C* are eligible for hire notwithstanding their *identical* "records of" drug addiction and claims of rehabilitation; the rule has no effect whatsoever on them. It follows that it was Hernandez's *misconduct while employed* (and consequent discharge for cause), not his drug use or possible drug addiction, that disqualified him. Hernandez therefore cannot claim to have been "screen[ed] out" "because of the disability" within the meaning of § 12112(a) & (b)(6).

In any event, any adverse impact would be beside the point by reason of § 12114(c)(4). Hernandez violated Hughes' drug-free workplace rule, and the consequences were: (i) involuntary termination; and (ii) ineligibility for rehire.[11] Thus, any adverse-impact claim here necessarily must attack the drug-free workplace rule and its corollaries. But the text of the ADA itself provides the defense to such an attack. Whatever the "business

11. These consequences attached at the time of his positive drug test. The later rejection of Hernandez's rehire application was simply the "delayed, but inevitable consequence" of the original discharge. *Cf. Delaware State College v. Ricks*, 449 U.S. 250, 257-58 (1980) (for a college professor, discharge automatically followed a year after denial of academic tenure). "It is simply insufficient," this Court explained in *Ricks*, "to allege that [a more-recent development] 'gives present effect to the past . . . act.'" *Id.* at 258 (citations omitted). "That is so even though one of the effects of the [initial decision] . . . did not occur until later." *Id.* "[The] proper focus is upon the . . . [first decision]," the *Ricks* Court concluded, and "not upon the time at which the consequences of [that first decision] became most painful." *Id.* (citations and internal quotations omitted).

necessity" defense might mean under the ADA in other cases, the defense exists as a matter of law here. Congress dealt specifically with the issue of drug use and stated that an employer may do exactly what Hughes did here: "hold an employee who engages in the illegal use of drugs . . . to the same qualification standards for employment" — in this case, discharge and ineligibility for rehire — "that such [employer] holds other employees." 42 U.S.C. § 12114(c)(4). No adverse-impact claim can attack an employer rule that the statute expressly makes lawful.

As a practical matter, applying the disparate impact theory in the manner suggested by NELA — where the plaintiff need only show that the employer's rule has an adverse impact on a group of one — would render irrelevant the reasonable accommodation aspects of the statute. Garden-variety ADA accommodation disputes, now measured against the well-understood test of "reasonableness" (on which the employee bears the burden) would be replaced by disparate impact cases, resolved on considerations of "business necessity" (which the employer must prove). That plainly is not the framework that Congress wrought; if Congress intended "adverse impact on a group of one" claims to be cognizable, "reasonable accommodation" liability never would have found its way into the statute in the first place.[12]

12. Hernandez and his *amici* repeatedly contend that Hughes never attempted to prove that "business necessity" supported its no-rehire policy. (*E.g.*, Resp. Br. at 31-33; NELA Br. at 8, 19 n.21, 25; Betty Ford Center Br. at 3, 6, 28-30.) But Hughes was never obligated to prove anything. No prima facie case of adverse impact was established; no defense was required, *e.g.*, *Gonzales v. City of New Braunfels*, 176 F.3d 834, 839 n.26 (5th Cir. 1999) (no need to adduce proof on a defense not implicated), and the language of § 12114(c) makes "qualification standards" like this one categorically lawful in any event. The cases cited by NELA (NELA Br. at 17-18 & nn.18-19) thus are inapposite. None involved an adverse-impact challenge to a qualification standard expressly authorized by the ADA.

The Court therefore should reject the suggestion of Hernandez's *amici* to dismiss the writ. There will be no more appropriate case than this one to consider whether no-rehire rules are lawful under the ADA. All of the issues identified in the petition and amplified in petitioner's brief are squarely presented. Dismissing the writ would leave in place the Ninth Circuit's holdings that: (i) the facially nondiscriminatory no-rehire policy that Hughes and thousands of other employers commonly employ is unlawful *per se* when applied to drug addicts who claim to be recovered; (ii) an employer engages in disparate treatment even though its decisionmaker is unaware that the employee is in a category protected by law; (iii) "regarded as" and "record of" plaintiffs are entitled to special treatment, not simply nondiscrimination; (iv) a "second chance" following misconduct is appropriate special treatment; and (v) the employer must make affirmative efforts to broadcast to its human resources staff (at a minimum) the disability status of employees terminated for misconduct (so that those human resources staffers later will be in a position to excuse applicants from the consequences of their misconduct should they reapply). The correct course is to reverse the decision below and wait for another day to review an adverse impact case arising in a context where it perhaps has merit. *Cf. Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993) (resolving ADEA disparate treatment question while reserving decision on a possible adverse impact issue).

IV. Conclusion

For the foregoing reasons and those stated in the opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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